Supreme Court, U. S.
FILED
JAN 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-1084

* * *

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

JULIUS CORPUS, ET AL.,
Respondents

* * *

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

BRIAN E. BERWICK
Assistant Attorney General

RENEA HICKS
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. _____

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

JULIUS CORPUS, ET AL.,
Respondents

* * *

Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

* * *

Petitioner W. J. Estelle, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 26, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated October 26, 1979, is reported at 605 F.2d 175 and is reproduced in the appendix hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 26, 1979. This petition for a writ of certiorari was filed within 90 days after that

final judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether an act authorizing an award of attorney's fees for services rendered before the Act's effective date is beyond Congress's power under Section 5 of the Fourteenth Amendment when it requires retroactive abrogation of Eleventh Amendment immunity?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved -- the Eleventh Amendment to the United States Constitution, Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution, and the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.No. 94-559 (Oct. 19, 1976), codified in 42 U.S.C. §1988 -- are set out in the appendix hereto as Appendix B.

STATEMENT OF THE CASE

This class action prisoner litigation, brought under 42 U.S.C. §1983, commenced on April 19, 1968, with the filing of a pro se petition. On April 13, 1969, an amended complaint was filed with the assistance of counsel, attacking, among other things, the Texas Department of Corrections' prohibition against mutual inmate legal assistance on general civil matters. At approximately the same time, the two attorneys, who many years later were awarded the attorney's fees at issue here, became associated as counsel in the litigation. On October 19, 1976, nearly seven and one half years later, the Civil Rights Attorney's Fees Awards Act of 1976 (hereinafter "the Act") became law.

After district court proceedings resulting in a ruling favoring George Beto, the predecessor in office of Petitioner Estelle, and after a reversal on appeal by the

Fifth Circuit, *see Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971), *cert. denied sub nom., Sellars v. Beto*, 409 U.S. 968 (1972), the district court issued a final judgment on December 12, 1975, granting injunctive and declaratory relief against TDC's ban on mutual inmate legal assistance on general civil matters. *Corpus v. Estelle*, 409 F.Supp. 1090 (S.D.Tex. 1975), *aff'd*, 551 F.2d 68 (5th Cir. 1977). During this litigation, no finding of bad faith was entered against Respondent Estelle.

After the Fifth Circuit affirmance, the inmate-plaintiffs requested the district court to award them attorney's fees under the Act, which had taken effect about two months before appellate arguments on the merits in *Corpus v. Estelle*. Following a hearing on the issue of attorney's fees in March, 1978, the district court awarded a total of $38,845.00 against Petitioner Estelle in his official capacity. The order is not specific, but it is undisputed that the overwhelming bulk of the award was for services rendered prior to the effective date of the Act.

On appeal, the Fifth Circuit affirmed the award, rejecting the argument that Congress lacked authority under Section 5 of the Fourteenth Amendment to authorize awards for services rendered prior to the Act's effective date. The court held that the logic of *Hutto v. Finney*, 437 U.S. 678 (1978), implicitly resolved the issue and made the fee award constitutionally permissible. 605 F.2d at 179. Stating that "an act of Congress taken pursuant to Section 5 is constitutional unless unconstitutional beyond a reasonable doubt," *id.* at 180, the court said it would uphold the fee award even if *Hutto* were not in its view dispositive. It found no affirmative reasons prohibiting Congress's action, *id.*, and suggested three reasons why fee awards under the Act in cases pending on the date of enactment -- presumably referring to fee awards for services prior to the Act -- might prospectively encourage civil rights lawsuits:

(1) that the awards would act as a barrier to unnecessary defense of a civil rights case;

(2) that they would compensate plaintiffs for their costs;

(3) that they would encourage continued active representation on the part of those attorneys engaged in protracted civil rights litigation pending at the time of enactment.

Id. at 178 n.4. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW INCORRECTLY PERMITTED CONGRESS TO RETROACTIVELY REMOVE STATES' ELEVENTH AMENDMENT IMMUNITY THROUGH AN EXERCISE OF ITS ENFORCEMENT POWERS UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

Hutto and *Bradley* leave this issue open. If the Act were held to be within Congress's Section 5 power, states' reliance upon past immunity would be disappointed. Neither the incentive rationale nor any other rationale proposed by Respondents or by the Fifth Circuit in this case supports application of the Act to pre-Act services.

A. The issue is not foreclosed by *Hutto* or *Bradley*.

In *Hutto v. Finney*, 437 U.S. 678 (1978), this Court held that Congress, in passing the Civil Rights Attorney's Fees Awards act of 1976, which amended 42 U.S.C. §1988, abrogated states' Eleventh Amendment immunity and made them susceptible to attorney's fees awards under the Act, even though the statute itself

contained no express statement of abrogation.

The issue here is one neither discussed nor analyzed in *Hutto:* whether Congress, through the Act, can constitutionally abrogate the Eleventh Amendment immunity *retroactively* by removing the immunity not only for events occurring on and after the date of abrogation but also for events occurring before the date of abrogation.

In rejecting the position urged here by Petitioner Estelle -- that the Act cannot constitutionally authorize attorney's fees awards for services rendered before the Act's effective date -- the Fifth Circuit observed that a similar rejection was "latent" within *Hutto's* holding. 605 F.2d at 179. But Petitioner notes that this Court's recitation of the facts in *Hutto* did not make clear that the award of fees for appellate services included services rendered prior to the Act's effective date. The Arkansas state officials' appeal was "submitted" to the Eighth Circuit on December 16, 1976. See 548 F.2d at 740. The Act took effect October 19, 1976, about two months earlier. "Submitted" presumably means orally argued. Thus, it is fair to assume that the *Hutto* plaintiffs' attorneys did some post-Act work. Considering that there were four of them, and considering modern hourly rates, and considering that preparing for oral argument and arguing involve a great deal of attorney effort, the $2,500.00 fee easily could have been earned between October 19, 1976, and December 16, 1976. But even if the facts on that point were clear and were unfavorable to Petitioner Estelle, this Court's opinion in *Hutto* did not substantively treat the issue -- probably for the reason that it was not thought of or raised by the parties. Thus, under traditional principles of narrow constitutional jurisprudence, the issue remains open. *See Edelman v. Jordan*, 415 U.S. 667, 670-71 (1974). Indeed, Petitioner argues -- or, perhaps more correctly stated, fervently

hopes -- that the Court purposely left it open. If the Justices were convinced that the Act could constitutionally allow awards for pre-Act work, they would not have treated the *Hutto* District Court award (which was clearly for pre-Act work) as separate from the Appeals Court award, and they would not have labored through a "bad faith" analysis with respect to the District Court award.[1]

B. The state's reliance on past immunity is disappointed.

The Eleventh Amendment prohibits the imposition of retroactive liability against a state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974). Congress, however, has the power to authorize the lifting of that immunity, either by expressing itself in the language of a statute, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), or by clearly expressing a legislative intention, discernible in legislative history, *Hutto, supra*, 437 U.S. at 698 n.31. *See Also Quern v. Jordan*, 440 U.S. 332, 344-45 (1979). It follows that, until Congress acts to lift the immunity, the immunity exists. If this were not the rule, states would be in an eternal twilight zone with respect to their

[1]In *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), the attorney's fee award clearly did include services rendered before the effective date of the relevant statute, which was 20 U.S.C. §1617 rather than the Civil Rights Attorney's Fees Awards Act. The issue was whether an appellate court should apply the law in effect at the time it renders its decision. The *Bradley* answer was yes, because no manifest injustice would result and there was no legislative direction to the contrary. Petitioner notes that the argument presented in the present petition was not treated in *Bradley*. More important, Eleventh Amendment rights were not at issue in *Bradley*. Thus, the retroactive award of attorney's fees against the school board under 20 U.S.C. §1617 did not run afoul of the special limitation upon Congress's Section 5 powers that inheres (according to Petitioner's central argument) in the Eleventh Amendment when Congress seeks to exercise those powers retroactively.

immunity. That is, the states, at any moment in time, would have no more than a contingent immunity, subject to retroactive Congressional divestment sometime in the indefinite future. This would disappoint the states' reliance. During the eight and one half years of this litigation preceding the Act's passage, the State of Texas defended the lawsuit (never in bad faith), assessed the factors weighing for and against settlement, and planned its fiscal activities, all in reliance upon immunity. The Fifth Circuit has now declared that immunity was just an illusion. Congressional power should not be held to operate upon the past in this manner. Otherwise, states will be unable to plan fiscal affairs or the conduct of litigation, because the rules might change in the middle of the game retroactively to its beginning.

Civil rights litigation has burgeoned in recent decades. Many important, complex, actively litigated civil rights cases were instituted years before the Act took effect and still pended afterwards. The Enforcement Division of the Texas Attorney General's Office is presently representing the state in cases in which claims for attorney's fees for pre-Act services total more than three hundred thousand dollars. Other states presumably face similar claims for pre-Act services. A prompt resolution by the Court of the issues presented by this petition would aid state litigants (and their opponents) in evaluating their cases with respect to possible settlement.

C. The Act's incentive rationale is logically inapplicable to pre-Act services.

The rationale for the Act was that with a potential fee award as incentive, attorneys would vindicate constitutional rights by filing cases which otherwise might never have been brought. This rationale, however, is applicable only to actions initiated after the Act's effective date, and to services rendered after the

effective date in actions initiated before that date. It just does not make sense with respect to services rendered before the effective date, because a non-existent act could not possibly have supplied an incentive to the delivery of those services. The inmates' attorneys in this case became associated with the litigation seven and one half years before passage of the Act. Their efforts clearly were not undertaken in reliance upon the potential benefits of the Act.

Restating the matter, application of the Act to pre-Act services (assuming arguendo that this was Congress's intention)[2] fails to meet the standard by which the constitutionality of legislation enacted pursuant to Congress's Section 5 enforcement powers must be measured. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), declared that Section 5 legislation is unconstitutional unless: (1) it may be regarded as an enactment to enforce some other provision of the Fourteenth Amendment; (2) it is " 'plainly adapted to that end;' " and (3) it is not prohibited by but is consistent with " 'the letter and spirit of the Constitution.' " *Id.* at 651. Petitioner contends that in the absence of a logical connection between the Act (as applied to pre-Act services) and Congress's litigation-encouraging purpose, the "plainly adapted" standard is not met.[3]

---

[2]The legislative history is relatively clear that the Act was meant to apply to cases pending on the date of enactment. But the legislative debates make only one direct reference to the question whether the Act is intended to cover prior services in those pending cases. See 122 Cong.Rec. H12160 (Oct. 1, 1976) (remarks of Rep. Drinan).

[3]The third *Morgan* standard -- that the legislation must be consistent with the "letter and spirit of the Constitution" -- also is not met. Awards for pre-Act services disappoint the states' reliance interests in their past immunity, see Part I.B., *supra*, and conflict with the Eleventh Amendment to that extent.

Petitioner Estelle recognizes that in effect he is proposing that the *Morgan* standard is more difficult to meet when the Eleventh Amendment is implicated. Some of the opinions in *Oregon v. Mitchell*, 400 U.S. 112 (1970), provide a foundation for a refined standard supporting Petitioner's proposition. *Mitchell* added the requirement that the legislative history of the challenged statute contain substantial evidence supporting the need for exercise of the Section 5 power to further other substantive provisions of the Fourteenth Amendment. *See, e.g.*, 400 U.S. at 133 (Black, J.) (test is whether "substantial evidence" supports legislation's effect); *id.* at 232, 234, 240, 248-49, 278-80 (Brennan, Marshall, and White, JJ.) (look to facts and testimony before legislators to determine whether "ample evidence" supports legislation's reach). The Act's legislative history reveals no facts before Congress suggesting that extension of the Act to cover services rendered prior to its effective date would aid the enforcement of the Due Process Clause or any other substantive provision of the Fourteenth Amendment.

The Fifth Circuit's standard for determining the constitutionality of legislation enacted pursuant to Section 5 -- that the legislation is constitutional unless unconstitutional beyond a reasonable doubt, 605 F.2d at 180 -- in light of the *Morgan* standard as refined in *Mitchell*, is too lenient. In giving virtually complete deference to Congress, it removes the judiciary too far from its " 'province and duty...to say what the law is.' " *Oregon v. Mitchell*, 400 U.S. at 204 (Harlan, J.), quoting from, *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

SUMMARY AND CONCLUSION

The Court should grant certiorari in this case to correct the Fifth Circuit's overly deferential view of congressional power vis a vis the states. Petitioner asks the Court to hold that the Act would be unconstitutional -- that is, would overreach Congress's Section 5 powers --

if applied to pre-Act services. Petitioner contends that there is no incentive rationale (and no other rationale) for rewarding pre-Act services, and that the state's reliance interests, generated by its past Eleventh Amendment immunity, would be injured.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

BRIAN E. BERWICK
Assistant Attorney General

RENEA HICKS
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Counsel for Petitioner

APPENDIX A

Julius CORPUS, Plaintiff-Appellee,

v.

W. J. ESTELLE, Jr., Director, Texas Dept. of Corrections, Defendant-Appellant.

No. 78-2194.

United States Court of Appeals, Fifth Circuit.

Oct. 26, 1979.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, HILL and VANCE, Circuit Judges.

WISDOM, Circuit Judge:

The complaint in this action was filed in April 1968. For the third time this case has surfaced in this Court. Ronald Novak filed the first case, pro se, as a § 1983 class action on behalf of all those in custody of the Texas Department of Corrections (TDC). He sought, among other things, declaratory and injunctive relief against a TDC practice of prohibiting legal assistance by one inmate to another. The district court found against the plaintiff class. *Novak v. Beto*, S.D.Tex.1970, 320 F.Supp. 1206. We reversed and held that the TDC could not enforce the prohibition until it provided an adequate legal assistance program for prisoners. *Novak v. Beto*, 5 Cir. 1971, 453 F.2d 661.

In spite of our decision, the TDC continued to enforce the prohibition. In 1972 the plaintiffs renewed proceedings to enforce this Court's decision. The TDC

vigorously resisted. It adopted a formal rule permitting prisoners to assist each other, but only in § 1983 cases; it made assistance in any other matter a violation of discipline. The district court enjoined the TDC "from maintaining or enforcing any rule or practice prohibiting prisoners . . . from giving or receiving legal assistance with regard to civil rights matters". It also issued a declaratory judgment stating that the "TDC rule or practice of prohibiting prisoners from giving or receiving legal assistance with regard to habeas corpus . . . [and] general civil legal matters is valid". *Corpus v. Estelle*, S.D.Tex.1975, 409 F.Supp. 1090, 1097. The TDC appealed. We affirmed in *Corpus v. Estelle*, 5 Cir. 1977, 551 F.2d 68.

The plaintiffs then sought fee awards under the Civil Rights Attorney's Fees Awards Act of 1976 (Act).[1] The Act had taken effect two months before the appellate argument on the merits in *Corpus v. Estelle*. The district court awarded a total of $38,845. Still vigorously fighting a rear guard action, the Attorney General of Texas sought a stay pending appeal, arguing that the Eleventh Amendment barred the award. When *Hutto v. Finney*, 1978, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522, foreclosed the TDC's argument, the district court denied the stay. TDC constructed a new argument, and a panel of this Court granted a stay. We affirm the award, but remand for the district court to determine and award a reasonable fee for the appeal.

[1]Pub.L. No. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988 (1976). The Act provides:

> In any action or proceeding to enforce a provision of [§§1977, 1978, 1979, 1980, and 1981 of the Revised Statutes] [42 U.S.C. §§ 1981-1983, 1985, 1986], Title IX of Public Law 92-318 [20 U.S.C. §§ 1681 *et seq.* (1976)], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs. 90 Stat. 2641.

I.

This appeal concerns a practice repeatedly found constitutional, carving out for reexamination a proposition embedded in the logic of many earlier decisions. In *Hutto v. Finney*, 1978, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522, the Supreme Court held that the Eleventh Amendment did not bar awards against states under the Act, including awards in cases pending at the time the Act was passed. This Court has granted such awards as a matter of course, even when the only question on appeal at the time of the passage of the Act was one of attorney's fees. *Rainey v. Jackson State College*, 5 Cir. 1977, 551 F.2d 672, 675-76. *See also Dillon v. AFBIC Development Corp.*, 5 Cir. 1979, 597 F.2d 556, 564; *Crowe v. Lucas*, 5 Cir. 1979, 595 F.2d 985, 993-94; *Universal Amusement Co., Inc. v. Vance*, 5 Cir. en banc 1978, 587 F.2d 159, 172; *Gore v. Turner*, 5 Cir. 1977, 563 F.2d 159, 163-64; *Miller v. Carson*, 5 Cir. 1977, 563 F.2d 741, 754-56; *Gates v. Collier*, 5 Cir. 1977, 559 F.2d 241; *Hodge v. Seiler*, 5 Cir. 1977, 558 F.2d 284, 286.[2]

No case, however, has raised as its sole contention that Congress lacked authority under Section 5 of the Fourteenth Amendment to provide awards under the Act, in cases pending on the date of enactment, for services rendered before that date. In support of this contention, the Attorney General points to Chief Justice Marshall's language, interpreting the necessary and proper clause, in *McCulloch v. Maryland*, 1819, 17 U.S.

[2]Other courts which have considered whether retroactive fee awards were proper under the Act have reached the same conclusion; no court appears to have reached a different one. *See, e.g., Perez v. Rodriguez Bou*, 1 Cir. 1978, 575 F.2d 21; *Rosado v. Santiago*, 1 Cir. 1977, 562 F.2d 114; *King v. Greenblatt*, 1 Cir. 1977, 560 F.2d 1024, *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161; *Rodriguez v. Jimenez*, 1 Cir. 1977, 551 F.2d 877; *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 2 Cir. 1978, 578 F.2d 34; *Wisenberger v. Huecker*, 6 Cir. 1979, 593 F.2d 49; *Bond v. Stanton*, 7 Cir. 1977, 555 F.2d 172, *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161; *Williams v. Anderson*, 8 Cir. 1977, 562 F.2d 1081.

(4 Wheat.) 316, 4 L.Ed. 579. This is the language that the Court borrowed in *Katzenbach v. Morgan*, 1966, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828, with particular reference to Section 5 of the Fourteenth Amendment.

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

17 U.S. (4 Wheat.) at 421. The Attorney General then assumes a strict standard for evaluating whether a given means is plainly adapted to a constitutional end.[3] Finally, positing the *prospective encouragement* of civil rights suits as the sole end of the Act,[4] the Attorney

[3]The Attorney General offers no support for this standard; he appears to rely on the notion that an act of Congress is not "plainly adapted" to an end unless it is physically necessary to produce that end. *McCulloch* itself demonstrates, in terms that could hardly be clearer, that this reading of its text is incorrect. Chief Justice Marshall there argued for an expansive, not a constricted, view of the necessary and proper clause, one that would facilitate, not hamper, the activities of federal sovereignty. That view has animated our understanding of Section 5 at least since *Katzenbach.*

[4]The Attorney General cites *Henderson v. Fort Worth Independent School District* 5 Cir. 1978, 574 F.2d 1210, as support for this reading of congressional intent. We there noted:

> In enacting the Civil Rights Attorney's Fees Awards Act of 1976, Congress sought "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 [95 S.Ct. 1612, 44 L.Ed.2d 141] (1975)." S.Rep. No. 94-1011, 94th Cong., 2nd Sess. 5, *reprinted in* U.S. Code Cong. & Admin.News, pp. 5908,5909.

574 F.2d at 1212. We further noted:

> [I]t is apparent from the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 that Congress' overriding concern was to encourage individuals, particularly members

General concludes that awarding fees in cases pending at the time of enactment is not a means plainly adapted to that end and is therefore unconstitutional.

II.

The Attorney General's argument rests on a misinterpretation of *Hutto v. Finney* and an inverted view of Section 5.

Hutto involved a challenge by State of Arkansas to a finding that conditions in the Arkansas penal system constituted cruel and unusual punishment, and to an award of attorney's fees. The judgment included (1) an award by the district court, and (2) a fee added by the court of appeals to cover legal services on appeal. The trial court award was supported by a finding of bad faith;[5] the appellate fee by reliance on the Civil Rights

> of racial minorities, to seek relief from invidious discrimination based on race, sex, religion, wealth, and other inherently offensive criteria. *See Brown v. Culpepper*, 559 F.2d 274, 278 (5 Cir. 1977); S.Rep. No. 94-1011, 94th Cong. 2d Sess. 5, *reprinted in* U.S.Code Cong. & Admin.News, p. 5908, 122 Cong.Rec. ¶ 1705 (daily ed. September 29, 1976) (remarks of Sen. Kennedy).

Id. It does not tire the imagination to consider that this "overriding concern" would be furthered by awarding fees in cases pending on the date of enactment. Three rationales come to mind: (1) that the awards would act as a barrier to unnecessary defense of a civil rights case; (2) that they would compensate plaintiff's attorneys for their costs; (3) that they would encourage continued active representation on the part of those attorneys engaged in protracted civil rights litigation pending at the time of enactment. Because of the standard of review appropriate in this case, *see* section II of this opinion, these rationales, each of which embodies a possible end of the extension of the Act to pending cases, are independently adequate to support the extension.

[5]The Supreme Court noted of the district court award that:

> In this case, the award of attorney's fees for bad faith served the same purpose as a remedial fine imposed for civil contempt. It vindicated the District Court's authority over a recalcitrant litigant. Compensation was not the sole motive for

Attorney's Fees Awards Act of 1976. *Finney v. Hutto*, 8 Cir. 1977, 548 F.2d 740, 742. In adding the appellate fee, the Eighth Circuit was careful to note that the Act "was signed into law . . . [at a time when this] case [was] pending resolution on appeal". *Id.*

The Supreme Court affirmed the awards. In reaching the conclusion that the court of appeals award was constitutional, Justice Stevens discussed the interrelation between the Eleventh Amendment and Section 5 of the Fourteenth Amendment.

> As this Court made clear in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contained no hint of an exception for States defending injunction actions; indeed the Act primarily applies to laws passed specifically to restrain state actions. *See, e.g.*, 42 U.S.C. § 1983.

437 U.S. at 693-94, 98 S.Ct. at 2575.

---

the award; in setting the amount of the fee, the court said that it would "make no effort to adequately compensate counsel for the work that they have done or for the time that they have spent on the case". 410 F.Supp., at 285. The court did allow a "substantial" fee, however, because "the allowance thereof may incline the Department to act in such a manner that further protracted litigation about the prisons will not be necessary."

437 U.S. at 691, 98 S.Ct. at 2574, 57 L.Ed.2d at 534-35.

The Court supported its conclusion by resort to the legislative history of the Act,[6] then discussed cases pending when the Act was passed:

> The Attorney General also contends that the fee awards should not apply to cases, such as this one, that were pending when the Act was passed in 1976. But the legislative history of the Act, as well as this Court's general practice, defeats this argument. The House Report declared: "In accordance with applicable decisions of Supreme Court, the bill is intended to apply to all cases pending on the date of enactment. . . ." H.R.Rep. No. 94-1558, p. 4 n. 6 (1976).

437 U.S. at 695 n. 23, 98 S.Ct. at 2576 (citation omitted).[7]

[1] The logic of *Hutto* resolves this case. An

---

[6]The legislative history is equally plain:

> "[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or out of his control, or from the State or local government (whether or not the agency or government is a named party)." S.Rep. No. 94-1011, p. 5 (1976) (footnotes omitted). The House Report is in accord: "The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." H.R.Rep. No. 94-1558, p. 7 (1976). The Report adds in a footnote that: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick v. Bitzer*". *Id.*, [at 7] n. 14. Congress' intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act and immunize states and local governments from awards.

437 U.S. at 694, 98 S.Ct. at 2576 (footnotes omitted).

[7]By referring to "this Court's general practice", we assume that Justice Stevens meant to make it clear that the constitutional question of the validity of applying the Act to pending cases having been determined in favor of validity, the remaining question was the usual one, whether a law should be applied to cases pending on the date of its enactment. *See* section III of this opinion.

inextricable part of the holding—that Congress successfully overcame the states' sovereign immunity by passing the Act under its Section 5 power—is the determination that Congress had the power to exercise. We cannot parse the Court's reasoning any other way. The Attorney General has not changed the problem the *Hutto* Court addressed by focusing not on the Eleventh Amendment but on Section 5. After *Hutto*, he is merely asking us to make the latent patent.[8]

Were *Hutto* less informative on the question of Section 5 power we would reach the same result. The Attorney General's argument—that awarding fees in pending cases is not a means *closely tailored* to a constitutional end, hence is unconstitutional—is based on a misunderstanding of Section 5 jurisprudence.

As long ago as 1880, in *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676, the Supreme Court said that were it not for Section 5, there might be room for argument that the Fourteenth Amendment only declared a moral duty of the states. Section 5, however, embodying a principle of federal sovereignty, empowered Congress to enforce the prohibitions of the Fourteenth Amendment against the states. In *Katzenbach v. Morgan*, 1966, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828, the Court expressly equated the function Section 5 performed for the

[8]The full effects of *Hutto* have not precipitated; theory concerning state liability under the civil rights laws is somewhat turbid in the wake of *Edelman v. Jordan*, 1974, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662; *Monell v. Department of Social Services of the City of New York*, 1978, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611; and *Quern v. Jordan*, 1979, ___U.S.___, 99 S.Ct. 1139, 59 L.Ed.2d 358. This case, however, does not depend on a careful working out of the ramifications of the cases. The facts of the present case regarding timing of services for which an award was granted under the Act are essentially the same as those in *Hutto*. Here the trial court's award compensated services performed before the Act's passage; there the appellate work was done before that date. We would, of course, affirm even if the only question pending had been one of attorney's fees. *See Rainey v. Jackson State College*, 5 Cir. 1977, 551 F.2d 672, 675-76.

Fourteenth Amendment with that performed by the necessary and proper clause for the numerated powers of Article 1. 384 U.S. at 650 & n. 9, 86 S.Ct. 1717. The equation was carried forward by *Fitzpatrick v. Bitzer*, 1976, 427 U.S. 445, 455, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614, 621.

Section 5 is the source of broad legislative authority to define and carry out the provisions of the amendment, an authority "plenary within the terms of the constitutional grant". *Fitzpatrick v. Bitzer*, 427 U.S. at 456, 96 S.Ct. at 2671. And in *Katzenbach*, the Court welcomed congressional assistance, based on Section 5, in shaping the contours of the sometimes elusive concepts embodied in the Fourteenth Amendment. In doing so, the Court made it plain that the judiciary should not lightly rebuff such congressional attempts. 384 U.S. at 653, 86 S.Ct. 1717.

[2] Congress has often acted to carry out the broad purposes of the Fourteenth Amendment by enacting specific statutes. This it did in many Civil Rights Acts, starting with the Civil Rights Act of 1957. This it did in the Civil Rights Attorney's Fee Awards Act of 1976. The correct way to phrase the question of legitimacy is not, are the means closely tailored to the ends; that question fails to take into account the plenary nature of congressional power under Section 5. One must ask instead whether affirmative reasons can be adduced that Congress may *not* so act. Such reasons may include that the action traverses a power of self determination inhering in the states, as Justice Black argued in his opinion in *Oregon v. Mitchell*, 1970, 400 U.S. 112, 128, 91 S.Ct. 260, 266, 27 L.Ed.2d 272, 283. Or that it seeks to allow or to require conduct the Court would find constitutionally impermissible, or to prohibit conduct the Court, for analytic reasons, would find permissible. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv.L.Rev.

1212, 1239-42 (1978). Or that it encroaches upon a liberty interest of individuals. *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan.L.Rev. 603, 614 (1975).

[3] The Attorney General has offered no affirmative reasons for finding that Congress has overstepped its Section 5 authority here. There are none. To borrow a phrase from James Bradley Thayer, an act of Congress taken pursuant to Section 5 is constitutional unless unconstitutional beyond a reasonable doubt. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv.L.Rev. 129, 151 (1893). Here there is no doubt at all.

III.

[4] Whether retroactive fee awards are proper under the Act is no different from the question whether any new law should be applied to cases pending on the date of its enactment. New laws will be so applied unless manifest injustice[9] would result, or there is a statutory directive or legislative history to the contrary, *Bradley v. Richmond School Board*, 1974, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476. Texas can make no serious contention of manifest injustice, there is no statutory directive to the contrary, and the Act's legislative history requires its application. H.R.Rep. No. 94-1558, p. 4 n. 6 (1976). U.S.Code Cong. & Admin.News 1976, p. 5908.

[9]Contrary to the TDC's protestations about the "manifest injustice" of a new and unanticipated award covering services rendered prior to the 1976 Act, the *Texas legislature planned for just such an award.* In its 1977 amendments to Article 6252-26, Vernon's Texas Civil Statutes, the legislature acknowledged state liability for awards of damages, "costs and attorney fees" against state officers and expressly provided that such liability covers not only subsequently filed cases but also "all judgments in *cases pending or on appeal on the effective date of the Act*" (August 29, 1977) (emphasis added). In short, the Texas legislature contemplated payment of fee judgments in cases pending when its statute became law.

[5] We hold that the amount of the award was amply supported by the evidence.[10] On remand, the district court should take evidence on the amount of additional time required to prosecute this appeal, and should award a reasonable fee for it.

Finally, the Attorney General argues that if we order the awards paid, we should specify that they be paid on an installment basis. It appears that this argument was not presented to the district court, although the question is one properly within the discretion of that court. We therefore do not address it. *D. H. Overmyer Co. v. Loflin*, 5 Cir. 1971, 440 F.2d 1213, 1215, *cert. denied* 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90.

[10]The district court made the following findings of fact:

1. The Court is intimately familiar with the case and the efforts of counsel over almost a nine-year period. This has been an extraordinary litigation, involving difficult issues and factual situations. The several Assistant Attorneys General representing defendant have vigorously resisted the efforts of plaintiffs' counsel at every juncture.
2. The Court finds that Mr. William Bennett Turner, plaintiffs' counsel, is an extraordinary lawyer of unquestionable integrity and credibility. As to the time and amount sought by Mr. Turner, the Court finds that all the time claimed was in fact spent and that the time claimed is significantly understated. All of the time was reasonable and necessary to prosecute this action.

. . . . .

4. Regarding the hourly rates to be applied, the Court finds the $90 an hour for trial and appeliate time (both in court and in immediate preparation for court) is a reasonable rate for Mr. Turner's time throughout the course of this litigation. Because of the unique circumstances of this case, the Court finds that Mr. Turner should get the same amount for trial time and for immediate trial preparation time. The Court also finds that $75 an hour for all other services rendered by Mr. Turner is a reasonable rate.

The judgment is AFFIRMED, and the case is REMANDED.

---

5. Ms. Frances Cruz was less involved in the actual preparation of the case and technical planning than Mr. Turner, who actually carried the case. As to the time and amount sought by Ms. Cruz, the Court finds that Ms. Cruz spent thirty-six hours in trial and that a reasonable rate, given her experience in trial work, is $35 an hour for her time throughout the course of this litigation. The Court credits Ms. Cruz with thirty-two hours of other services and finds that $25 an hour for such time is reasonable.

APPENDIX B

The Eleventh Amendment to the United States Constitution is as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 5 of the Fourteenth Amendment to the United States Constitution is as follows:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Public Law 94-559 (Oct. 19, 1976), as codified in 42 U.S.C. §1988, is as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.